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GPQ Sdn Bhd v Constant View Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-02(W)-780–05 OF 2015
PRASAD ABRAHAM, HASNAH HASHIM AND ASMABI MOHAMAD JJCA
20 JUNE 2017

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Contract — Terms — Condition precedent — Respondent brought action against appellant for breach of principle document — Whether appellant failed to honour its obligations as stipulated in principle agreement — Whether respondent lacked standing to commence the proceedings — Whether terms of agreement clear and unambiguous — Whether contracts entered by respondent were conditional agreements — Whether learned judge wrongly applied doctrine of legitimate expectation

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This was an appeal against the decision of the High Court which allowed the respondent's claim against the appellant with costs of RM15,000 and with a further order for both special and general damages to be assessed by the deputy registrar. The State of Terengganu ('the state') intended to redevelop Pekan Cabang Tiga in Kuala Terengganu ('the said project'). On 3 March 2004, the state agreed to accept the appellant's proposal to undertake the said project and the approval for the same was stated in the State Exco Meeting dated 3 March 2004. On 21 March 2004, the appellant and EDV Landmark Sdn Bhd ('EDV') entered into an agreement known as 'Perjanjian Pembangunan Cabang Tiga' ('the principal agreement') and pursuant to the principal agreement, EDV was appointed by the appellant to carry out the said project. EDV intended to assign its rights and liabilities under the principle agreement to the respondent. EDV and the respondent then signed a memorandum of understanding ('MOU') dated 6 November 2005 and on 18 December 2005, EDV and the respondent signed an agreement to allow EDV to assign its right and liabilities under the principle agreement to the respondent ('18 December agreement') subject to the following conditions: (a) the consent of the appellant and the state pertaining to the proposed assignment of rights and liabilities of EDV under the principle agreement to the respondent; (b) EDV and the respondent would sign an absolute assignment agreement for EDV to assign all its right and liabilities under the principle agreement to the respondent subject to prior consent of the appellant and the state; and (c) in the event the respondent failed to obtain the consent of the appellant and the state

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A by 17 June 2006 the 18 December agreement would automatically become void. On 14 November 2007 vide its Exco Meeting No 35/2007, the state cancelled its earlier decision vide Exco Meeting No 423 C/2004 dated 3 March 2004 for the appellant to carry out the project. Via its letter dated 11 February 2008, the appellant notified EDV of the decision vide Exco Meeting No 423
B C/2004 dated 3 March 2004. Upon its cancellation, the state then considered a new proposal to redevelop 'Pusat Dagang di Cabang Tiga Kuala Terengganu'. The respondent then commenced a suit against the appellant on 13 February 2011 for breach of the principle agreement. The respondent claimed for losses suffered due to the appellant's failure to honour its obligations as stipulated in
C the principle agreement. In the present appeal, the appellant contended that: (i) the learned judge erred in failing to make the ruling that the MOU and the 18 December agreement were conditional agreements and the condition precedent had not been complied with, as such, there was no concluded contract between EDV and the appellant; (ii) the learned judge erred in his
D appreciation of the law pertaining to the doctrine of the privity of contract; and (iii) the learned judge had wrongly applied the doctrine of legitimate expectation in a private law matter. On the other hand, the respondent was relying on oral negotiations to prove that there was a valid agreement between the respondent and the appellant.

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Held, allowing appeal with costs of RM30,000 herein and below to be paid by the respondent to the appellant subject to allocator; setting aside decision of the High Court:

F (1) Based on the evaluation of the evidence before the learned trial judge, both the testimonial and documentaries, the court found that there was no oral and/or written consent given by the state to accede to the MOU and/or the 18 December agreement. Neither was there any consent given by the appellant for the same. Therefore, the right and liabilities of EDV
G under the principle agreement were never assigned to the respondent. The court was of the view that the respondent lacked the standing to commence the proceedings against the appellant (see para 32).

(2) There was no evidence adduced by the respondent before the learned High Court judge to show that the 18 December agreement had been
H extended. The court found that until 17 June 2006 (the stipulated dateline in the 18 December agreement) the respondent failed to obtain the consent of the appellant and the state for the rights and the liabilities under the principle agreement to be assigned to the respondent. Therefore, the 18 December agreement was deemed automatically void
I and there was no assignment of right from EDV to the respondent to begin with. There was no contract to be enforced at all as the decision for

the appellant to carry out the said project had been cancelled (see paras 40–41). A

(3) There was a lack of judicial appreciation of the material facts when the learned High Court judge concluded that there existed continues negotiations between the appellant and the respondent from their conduct and from this conduct there was agreement between the parties. These findings were based in a mere conjecture unsupported by the credible evidence. The court also found that the respondent's own witness had admitted that there was no consent given by the appellant for assignment of rights and liabilities from EDV to the respondent. As the state itself had cancelled the project, there was nothing the appellant could do to give effect to the principle agreement (see paras 44–45). B C

(4) There was no evidence adduced by the respondent to support the argument that there existed a collateral agreement and/or that a contract had been concluded between the respective parties that entitled the respondent to pursue its claim against the appellant for breach of contract. Therefore, the learned trial judge's findings that there existed a valid contract between the appellant and respondent by way of conduct was misconceived. The court agreed with the appellants written and oral submissions that the MOU and 18 December agreement satisfied the requirements that the 18 December agreement and the MOU were conditional agreements and the conditional precedent stated could not be fulfilled by the appellant. Therefore, the agreement remained conditional, ie unless and until the consent of the state and appellant were obtained, such an agreement remained void and unenforceable (see paras 46–47). D E F

(5) The oral evidence and/or collateral agreement which the respondent claimed to have existed would not have effect on the MOU and/or the 18 December agreement. The respondent's oral evidence which the sought to allege that there existed a valid contract was inadmissible by reason of ss 91 and 92 of the Evidence Act 1950 (see para 48). G

(6) The respondent could only enforce the MOU and the 18 December agreement if it had complied with the condition precedent. The respondent had failed to prove the rights and liabilities pursuant to the MOU and the 18 December agreement had in fact been transferred to them within the time stated in the MOU and/or the 18 December agreement. There was no agreement in writing executed by the appellant and respondent pursuant to the 18 December agreement. Therefore, the rights and liabilities under the 18 December agreement remained with EDV until repudiated (see paras 53 & 55). H I

(7) Based on the factual matrix outlined, the MOU and 18 December agreement automatically became void because the condition precedent in the MOU and 18 December agreement were not fulfilled by 17 June 2006. Since the MOU and 18 December agreement were void and unenforceable, there was no assignment of rights and liabilities from EDV to the respondent. As such, there was no basis for the respondent to commence this action against the appellant on the terms of the principle agreement. Further the principle agreement was void pursuant to s 33(b) of the Contracts Act 1950 when the state cancelled its approval (see para 56).

(8) The doctrine of legitimate expectation was only applicable in public law and not the private law matters. The learned judge had also erred in making an order for the special damages to be assessed in the same manner the general damages ought to be assessed when the same could be quantified based on oral as well as documentary evidence adduced. The evaluation of this evidence to produce the quantified amount ought to have been done at the time the judgment was delivered (see paras 57–58).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan responden terhadap perayu dengan kos sebanyak RM15,000 dan dengan perintah selanjutnya bagi kedua-dua ganti rugi khas dan am untuk ditaksirkan oleh penolong pendaftar. Kerajaan Negeri Terengganu ('kerajaan negeri') ingin membangunkan semula Pekan Cabang Tiga di Kuala Terengganu ('projek tersebut'). Pada 3 Mac 2004, kerajaan negeri bersetuju untuk menerima cadangan perayu untuk mengusahakan projek tersebut dan persetujuan tersebut telah dinyatakan di dalam Mesyuarat Exco Negeri bertarikh 3 Mac 2004. Pada 21 Mac 2004, perayu dan EDV Landmark Sdn Bhd ('EDV') memasuki satu perjanjian yang dikenali sebagai 'Perjanjian Pembangunan Cabang Tiga' ('perjanjian utama') dan berdasarkan perjanjian utama tersebut, EDV telah dilantik oleh perayu untuk menjalankan projek tersebut. EDV berniat untuk menyerahkan hak dan liabilitinya di bawah perjanjian utama kepada responden. EDV dan responden kemudiannya menandatangani memorandum persefahaman ('MP') bertarikh 6 November 2005 dan pada 18 Disember 2005, EDV dan responden menandatangani satu perjanjian untuk membenarkan EDV untuk menyerahkan hak dan liabilitinya di bawah perjanjian utama kepada responden ('perjanjian 18 Disember') tertakhluk kepada syarat-syarat berikut: (a) persetujuan perayu dan kerajaan negeri berkaitan dengan penyerahan hak dan liabiliti EDV yang dicadangkan di bawah perjanjian utama kepada responden; (b) EDV dan responden akan menandatangani perjanjian penyerahan muktamad bagi EDV untuk menyerahkan semua hak dan liabiliti di bawah perjanjian utama kepada

responden tertakhluk kepada persetujuan terdahulu daripada perayu dan kerajaan negeri; dan (c) jika responden gagal untuk mendapatkan persetujuan daripada perayu dan kerajaan negeri sebelum 17 Jun 2006, perjanjian 18 Disember akan secara automatik menjadi tidak sah. Pada 14 November 2007 melalui Mesyuarat Exco No 35/2007, kerajaan negeri telah membatalkan keputusannya yang terdahulu melalui Mesyuarat Exco No 423 C/2004 bertarikh 3 Mac 2004 untuk perayu menjalankan projek tersebut. Melalui suratnya yang bertarikh 11 Februari 2008, perayu memaklumkan kepada EDV berkenaan dengan keputusan Mesyuarat Exco No 423 C/2004 bertarikh 3 Mac 2004. Selepas pembatalan tersebut, kerajaan negeri kemudiannya mempertimbangkan cadangan baru untuk membangunkan 'Pusat Dagang di Cabang Tiga Kuala Terengganu'. Responden kemudiannya memfailkan tindakan terhadap perayu pada 13 Februari 2011 atas alasan pelanggaran perjanjian utama. Responden menuntut kerugian yang dialami akibat daripada kegagalan perayu untuk menjalankan tanggungjawabnya seperti yang ditetapkan di dalam perjanjian utama. Di dalam rayuan semasa, perayu berhujah bahawa: (i) hakim bijaksana terkhilaf apabila gagal membuat dapatan bahawa MP dan perjanjian 18 Disember tersebut merupakan perjanjian-perjanjian bersyarat dan prasyarat perjanjian-perjanjian tersebut masih belum dipatuhi, oleh itu, tiada kontrak yang muktamad di antara EDV dan perayu; (ii) hakim bijaksana terkhilaf dalam penghargaannya terhadap undang-undang berkaitan priviti kontrak; dan (iii) hakim bijaksana telah tersalah menggunakan doktrin jangkaan yang sah di dalam permasalahan undang-undang persendirian. Sebaliknya, responden bergantung kepada rundingan untuk membuktikan bahawa terdapat perjanjian yang sah di antara responden dan perayu.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM30,000 di sini dan di bawah dibayar oleh responden kepada perayu tertakhluk kepada alokator; mengenepikan keputusan Mahkamah Tinggi:

(1) Berdasarkan penilaian keterangan oleh hakim bicara yang bijaksana, kedua-dua testimoni dan dokumentari, mahkamah mendapati bahawa tidak terdapat persetujuan secara lisan dan/atau bertulis yang diberikan oleh kerajaan negeri untuk menyetujui MP dan/atau perjanjian 18 Disember. Tidak juga terdapat persetujuan yang diberikan oleh perayu. Oleh itu, hak dan liabiliti EDV di bawah perjanjian utama tidak pernah diberikan kepada responden. Mahkamah mendapati bahawa responden tidak berada dalam kedudukan untuk memulakan tindakan terhadap perayu (lihat perenggan 32).

(2) Tiada bukti yang dikemukakan oleh responden di hadapan hakim Mahkamah Tinggi yang bijaksana untuk menunjukkan bahawa perjanjian 18 Disember telah dilanjutkan. Mahkamah mendapati bahawa sehingga 17 Jun 2006 (tarikh akhir yang ditetapkan di dalam perjanjian 18 Disember), responden gagal untuk mendapatkan

persetujuan perayu dan kerajaan negeri bagi penyerahan hak dan liabiliti di bawah perjanjian utama kepada responden. Oleh itu, perjanjian 18 Disember secara automatiknya dianggap tidak sah dan tiada penyerahan hak daripada EDV kepada responden dari awal lagi. Tiada langsung kontrak untuk dikuatkuasakan memandangkan keputusan untuk perayu menjalankan projek tersebut telah pun dibatalkan (lihat perenggan 40–41).

(3) Terdapat kekurangan penilaian kehakiman ke atas fakta-fakta material apabila hakim Mahkamah Tinggi yang bijaksana memutuskan bahawa terdapat rundingan berterusan di antara perayu dan responden berdasarkan tingkah laku mereka dan daripada tingkah laku tersebut, terdapat perjanjian di antara pihak-pihak. Dapatan-dapatan ini berdasarkan tekaan semata-mata dan tidak disokong oleh keterangan yang kredibel. Mahkamah juga mendapati bahawa saksi responden sendiri telah mengakui bahawa tidak terdapat persetujuan yang diberikan oleh perayu untuk penyerahan hak dan liabiliti daripada EDV kepada responden. Memandangkan kerajaan negeri sendiri telah membatalkan projek tersebut, tidak ada apa-apa yang boleh dilakukan untuk menguatkuasakan perjanjian utama (lihat perenggan 44–45).

(4) Tiada keterangan yang dikemukakan oleh responden untuk menyokong hujahan bahawa terdapat perjanjian kolateral dan/atau bahawa kontrak telah dimuktamadkan di antara pihak-pihak yang membolehkan responden untuk meneruskan tuntutannya terhadap perayu bagi pelanggaran kontrak. Oleh itu, dapatan hakim bicara yang bijaksana bahawa terdapat kontrak yang sah di antara perayu dan responden melalui tingkah laku adalah salah. Mahkamah bersetuju dengan hujahan-hujahan bertulis dan lisan perayu bahawa MP dan perjanjian 18 Disember memenuhi keperluan bahawa perjanjian 18 Disember dan MP merupakan perjanjian-perjanjian bersyarat dan prasyarat yang dinyatakan tidak dipenuhi oleh perayu. Oleh yang demikian, perjanjian tersebut kekal bersyarat, iaitu melainkan dan sehingga persetujuan perayu diperolehi, perjanjian tersebut kekal tidak sah dan tidak boleh dikuatkuasakan (lihat perenggan 46–47).

(5) Keterangan lisan dan/atau perjanjian kolateral yang didakwa wujud oleh responden tidak akan memberikan kesan ke atas MP dan/atau perjanjian 18 Disember tersebut. Keterangan lisan responden yang mendakwa bahawa terdapat kontrak yang sah tidak dapat diterima atas sebab ss 91 dan 92 Akta Keterangan 1950 (lihat perenggan 48).

(6) Responden hanya boleh menguatkuasakan MP dan perjanjian 18 Disember tersebut jika responden telah memenuhi prasyarat. Responden telah gagal membuktikan bahawa hak dan liabiliti menurut MP dan perjanjian 18 Disember telah diserahkan kepada mereka dalam masa yang ditetapkan di dalam MP dan/atau perjanjian 18 Disember.

Tidak terdapat perjanjian bertulis yang dimaterai oleh perayu dan responden menurut perjanjian 18 Disember. Oleh itu, hak dan libiliti di bawah perjanjian 18 Disember kekal bersama EDV sehingga dibatalkan (lihat perenggan 53 & 55).

(7) Berdasarkan matriks fakta kes yang digariskan, MP dan perjanjian 18 Disember telah menjadi tidak sah secara automatik kerana prasyarat MP dan perjanjian 18 Disember telah gagal dipenuhi sebelum 17 Jun 2006. Memandangkan MP dan perjanjian 18 Disember adalah tidak sah dan tidak boleh dikuatkuasakan, maka tidak terdapat penyerahan hak dan liabiliti daripada EDV kepada responden. Oleh itu, responden tidak mempunyai asas untuk memulakan tindakan ini terhadap perayu di atas terma perjanjian utama. Selanjutnya, perjanjian utama adalah tidak sah menurut s 33(b) Akta Kontrak 1950 apabila kerajaan negeri membatalkan kelulusannya (lihat perenggan 56).

(8) Doktrin jangkaan yang sah hanya terpakai di dalam permasalahan undang-undang awam dan bukan di dalam permasalahan undang-undang persendirian. Hakim bijaksana juga terkhilaf dalam membuat perintah agar ganti rugi khas ditaksirkan dengan cara yang sama ganti rugi am ditaksirkan apabila yang sama boleh dikira berdasarkan keterangan lisan dan keterangan dokumentari yang dikemukakan. Penilaian keterangan-keterangan tersebut untuk menghasilkan jumlah yang dikira mesti dilakukan semasa penghakiman disampaikan (lihat perenggan 57–58).]

Notes

For cases on condition precedent, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7136–7147.

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47, PC (folld)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 1 MLRA 183, FC (refd)
Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors [1997] 4 MLJ 329, HC (refd)
Director General of Inland Revenue v Ee Sim Sai [1977] 2 MLJ 32 (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243, FC (refd)
Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170; [1967] 1 MLRA 426, PC (refd)
Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (folld)
Southwest Minerals (M) Sdn Bhd v Kekal Baru Sdn Bhd [2014] 1 LNS 1076, HC (folld)
United Malayan Banking Corp Bhd v Tan Lian Keng & Ors [1990] 1 MLJ 280, HC (refd)
Wolley Development Sdn Bhd v Mikien Sdn Bhd [2008] 1 MLJ 585, CA (refd)

Legislation referred to

Contracts Act 1950 s 33(b)
Evidence Act 1950 ss 91, 92

Appeal from: Civil Suit No 22–11 of 2011 (High Court, Kuala Terengganu)

Helmi bin Hamzah (Mohd Rosly Khady bin Mohd Ayub Khan and Alif Ridhwan bin Mohd Yusof with him) (Hisham Sobri & Kadir) for the appellant.
Muhammad Shafee Abdullah (Wan Aizuddin Wan Mohammed with him) (Shafee & Co) for the respondent.

Asmabi Mohamad JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant (the defendant in the High Court) against of the decision of the High Court of Kuala Terengganu dated 10 April 2015 made after a full trial, which allowed the plaintiff's claim against the defendant with costs of RM15,000 and with a further order for both the special and general damages to be assessed by the deputy registrar.

[2] We heard this appeal on 21 October 2016. After hearing the respective parties we adjourned the matter for our consideration and decision.

[3] We now give our decision and the reasons for the same.

[4] We will refer to the parties as they were described in the High Court.

BRIEF BACKGROUND FACTS

[5] The salient facts are elucidated from the pleadings, judgment of the learned High Court judge and the submissions of the respective parties. In order to save judicial time, the facts as highlighted in the above mentioned documents are adopted herein with and/or without modifications.

[6] The State Government of Terengganu ('the state') intended to redevelop Pekan Cabang Tiga in Kuala Terengganu ('the said project'). A

[7] The defendant submitted a proposal to the state to redevelop Pekan Cabang Tiga in two phases respectively as follows: B

(a) 'Bangunan Strata Ruang Perniagaan 4 Tingkat Blok A dan Blok B serta tempat letak kereta sub-basement which was known as Kompleks Mesra Rakyat' ('Kompleks Mesra Rakyat') ('Phase 1'); and

(b) '5 Blok Bangunan 2 Tingkat Ruang Perniagaan Di Atas Laluan Air Sungai' which was known as Plaza Riveria ('Plaza Riveria') ('Phase 2'). C

[8] On 3 March 2004 the state agreed to accept the defendant's proposal to undertake the said project. The approval for the same was stated in the state exco meeting dated 3 March 2004 (see Preamble A at p 501 of appeal record 2A ('AR 2A')). D

[9] On 21 March 2004 the defendant and EDV Landmark Sdn Bhd ('EDV') entered into an agreement known as 'Perjanjian Pembangunan Cabang Tiga' ('the principal agreement') and pursuant to the principal agreement, EDV was appointed by the defendant to carry out the said project (see exh P3A at pp 499–545 of AR 2A). E

[10] EDV intended to assign its rights and liabilities under the principal agreement to the plaintiff. EDV and the plaintiff then signed a memorandum of understanding dated 6 November 2005 ('MOU') ('exh P2') subject to the following conditions: F

(a) the assignment of EDV's rights and liabilities to the plaintiff must be with prior consent of the state and the defendant (see MOU Condition 1 of AR 2A at p 493); G

(b) after the consent of the state and the defendant had been obtained EDV and the plaintiff must execute an assignment agreement to reflect the assignment of rights and liabilities (see terms No 2, 3 and 4 of the MOU at p 493 of AR 2A); and H

(c) in the event the plaintiff failed to obtain the consent of the defendant and the state by 31 January 2006 or any extended period as agreed by the respective parties to the MOU, the MOU would become void automatically (see term No 5 of the MOU at p 494 of AR2). I

[11] On 18 December 2005, EDV and the plaintiff signed an agreement to

allow EDV to assign its rights and liabilities under the principal agreement to the plaintiff ('18 December agreement') subject to the following conditions:

(a) the consent of the defendant and the state pertaining to the proposed assignment of rights and liabilities of EDV under the principal agreement to the plaintiff (see Condition No 1 of the 18 December agreement at pp 134–135 of AR *Jld* 1 Part A);

(b) EDV and the plaintiff would sign an absolute assignment agreement for EDV to assign all its rights and liabilities under the principal agreement to the plaintiff subject to prior consent of the defendant and the state; and

(c) in the event the plaintiff failed to obtain the consent of the defendant and the state by 17 June 2006 the 18 December agreement would automatically become void (see term No 5 of the 18 December agreement at p 498 of AR A2).

[12] On 14 November 2007 vide its exco meeting No 35/2007, the state cancelled its earlier decision vide exco meeting No 423 C/2004 dated 3 March 2004 for GPQ to carry out the said project (see exh D4 at p 546 of AR 2A).

[13] By its letter dated 11 February 2008, the defendant notified EDV of the decision of the state to cancel its decision vide exco meeting No 423 C/2004 dated 3 March 2004 (see exh D5 at p 547 of AR 2A).

[14] After the cancellation of its decision vide exco meeting No 423 C/2004 dated 3 March 2004, the state considered a new proposal to redevelop 'Pusat Dagang di Cabang Tiga Kuala Terengganu' (see exh P14 at p 593 of AR 2A).

[15] The plaintiff then commenced this suit against the plaintiff on 13 February 2011 for breach of the principle agreement. The plaintiff claimed for losses suffered due to the defendant's failure to honour its obligations as stipulated in the principal agreement.

THE MEMORANDUM OF APPEAL

[16] The summary of the issues raised in the memorandum of appeal were as follows:

(a) the learned judge erred as the learned judge had failed to consider, pursuant to the principal agreement, the defendant had in fact entered into a contract with EDV Landmark Sdn Bhd and not with the plaintiff. Therefore there was no contractual relationship between the defendant

and the plaintiff. Hence the terms and conditions as stipulated in the MOU and the 18 December agreement did not bind to defendant;

(b) the learned judge erred, in concluding that there were continuous negotiations between the plaintiff and the defendant and the representatives of the state and by their conduct the plaintiff had a legitimate expectation that it would undertake the said project in place of EDV;

(c) that the learned judge erred in failing to make a ruling that the MOU and the 18 December agreement were conditional agreements subject to the condition precedent that the consent of the defendant and the state had to be obtained before any rights and liabilities under the principal agreement could be assigned to the plaintiff. In the case at hand the condition precedent had not been complied with. As such there was no concluded contract between the EDV and the defendant;

(d) the learned judge erred, in allowing the plaintiff's claim despite no evidence having been led by the plaintiff to show the state and the defendant had given their consent to the MOU and 18 December agreements;

(e) the learned judge erred in his appreciation of the law pertaining to the doctrine of privity of contract; and

(f) the learned judge had wrongly applied the doctrine of legitimate expectation in a private law matter.

IN THE HIGH COURT

The plaintiff's case

[17] Before the High Court, the principal issues raised by the plaintiff were that:

(a) the principal agreement between the plaintiff and EDV shall directly bind the plaintiff and the defendant in their capacity as successors in tittle or successors to EDV. This principal agreement was valid between the plaintiff and EDV, and simultaneously would bind the defendant at all material times;

(b) the defendant was fully aware that the plaintiff had replaced EDV under the principal agreement and this was at the request of the defendant. The plaintiff, the defendant and the representatives of the state had proceeded thereafter to enter into negotiations pertaining to the said project and this had been going for a period of three years;

(c) the defendant by their actions, meeting and other conduct through their directors or other representatives of the defendant, had negotiated with

the plaintiff. The defendant had full knowledge and acquiesced of the plaintiff's involvement in the said project;

(d) there was a collateral or oral contract which binds the plaintiff in completing the obligations to develop the said project as agreed in the principal agreement. This collateral contract also binds the defendant to acknowledge the status, obligations and liabilities of the plaintiff pursuant to the 18 December agreement;

(e) the plaintiff had a legitimate expectation either through the principal agreement, the MOU and/or the 18 December agreement and/or through the conduct of the defendant's representatives that the plaintiff had every right to carry out the said project to replace EDV. Vide the 18 December agreement, the defendant had accepted the plaintiff as having fully replaced EDV in the principal agreement;

(f) at the material times EDV, was no longer a party to the principal agreement and had relinquished and/or surrendered all their rights and/or obligations to the plaintiff. As such the alleged termination of the principal agreement ought to have been communicated to the plaintiff and not EDV. The plaintiff was willing, able and ready to perform their part of the obligations under the principal agreement; and

(g) the defendant had breached the principal agreement and/or had caused to be allowed and/or had consented for a third party to be appointed to replace the plaintiff to carry on with the development of the said project. Despite the fact that the plaintiff was the interested party, the defendant did not see it fit to give notice of the same to the plaintiff.

The defendant's case

[18] The defendant, on the other hand, had raised the following issues:

(a) the principal agreement entered into between the defendant and EDV and the 18 December agreement entered into between the plaintiff and EDV did not bind the defendant. Therefore there were no obligations imposed on the defendant;

(b) the 18 December agreement was null and void as it had lapsed by 17 June 2006;

(c) alternatively, the defendant contended that the said project was terminated by the state on 9 January 2008. This was informed to EDV on 11 February 2008. Therefore the principal agreement was null and void. As such the plaintiff has no locus standi to maintain this suit against the defendant; and

(d) the defendant had also contended that the plaintiff's claim is an abuse of process of the court and premature as the said project was never allocated to the defendant by the state.

The decision of the High Court

[19] The learned trial judge had provided his skeletal grounds for allowing the plaintiff's claim (see pp 6(a)–(d) of the appeal record (*Jld* 1) (Part A)) and promised to prepare his detailed grounds at a later date, in event an appeal is lodged. However, until the time we heard the appeal the learned judge's grounds were not before us. The brief grounds provided by the learned judge could be summarised as follows:

(a) the terms of the agreement were clear and unambiguous;

(b) the state had, vide its exco meeting approved the development of the said project to be undertaken by the defendant. There was an agreement entered into between the state and the defendant for the development of the said project;

(c) the defendant had entered into an agreement with EDV to develop the said project. Vide the MOU and the 18 December agreement, the EDV agreed to assign all its rights and liabilities under the principal agreement to the plaintiff. The terms in the MOU and the 18 December agreement were clear and unambiguous;

(d) pursuant to cl 3 of the MOU and the 18 December agreement the consent of the state had to be obtained before EDV assigns all its rights and obligations under the 18 December agreement to the plaintiff. In the event the consent of the state could not be obtained within the period of six months from the date of the execution of the said agreement and/or any extended period as may be agreed, the agreement shall be deemed cancelled;

(e) after the agreement had been executed, the court found that there were continuous negotiations held between the plaintiff and the defendant and the representatives of the state. Based on these negotiations the plaintiff had a legitimate expectation that it would be given the task to proceed with the project till completion in place of EDV;

(f) the appointment of the third party was contrary to the intent and purport of the MOU, the 18 December agreement and the series of negotiations held between parties; and

(g) based on the aforesaid there was repudiation of contract on the part of the defendant. Therefore, the plaintiff's claim against the defendant as stated in paras 14.1 and 14.2 in the statement of claim were allowed with

costs of RM15,000. The learned judge made a further order for special damages and general damages to be assessed by the senior assistant registrar.

OUR DECISION

The law

[20] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance.

[21] In the course of that, we had sought guidance from the very often quoted case of *Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor* [2003] 2 MLJ 97 where the Court of Appeal held as follows:

> an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[22] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

The appeal before us

Conditional agreement

[23] It was argued before us, that the plaintiff and EDV had signed a conditional MOU. Learned counsel for the plaintiff had highlighted the relevant clauses in the MOU to illustrate this point. Clauses 1 and 2 to the MOU were concerned with the assignment of all rights and liabilities of EDV under the principal agreement to the plaintiff. These clauses had stipulated a condition precedent for the said assignment of rights and liabilities to be executed only if the consent of the defendant as well as the state had been obtained.

[24] As a consideration for the above assignment of EDV's rights and liabilities under the principal agreement to the plaintiff, EDV would be paid a sum of RM200,000. There was a condition imposed, in that, the above

assignment of rights and liabilities of EDV to the plaintiff could only be made with the consent of the defendant and the state. A

[25] Pursuant to Preamble II of the 18 December agreement, EDV had agreed to assign all its rights and liabilities under the principal agreement to the plaintiff subject to the consent of the defendant and the state. B

[26] Clause 3 of the 18 December agreement executed by the EDV and the plaintiff made provision for EDV and the plaintiff to execute an absolute assignment of rights and liabilities of EDV under the principal agreement to the plaintiff only if the consent of the state and the defendant had been obtained. Learned counsel argued that there was no agreement entered into between EDV and the plaintiff for the assignment of rights and liabilities under principal agreement to be made absolute. C

[27] Further cl 5 of the 18 December agreement stipulated that the 18 December agreement shall be cancelled if the consent of defendant and the state had not been obtained within the period of six months from the date of the execution of the agreement ie on 16 June 2006 unless further extended with the consent of the defendant and the state. As there was no further agreement having been signed by the respective parties, the said agreement therefore had lapsed. Hence all claims made pursuant to the same must then fall. D E

[28] Learned counsel for the defendant further argued that the evidence before the court vide PW1 himself had confirmed that there was no consent given by the defendant to the conditional agreement. PW1 too had confirmed that the 18 December agreement shall be automatically cancelled if the consent of the defendant and the state had not been obtained within six months from the date of the execution of the 18 December agreement unless the agreement was further extended with the consent of the defendant and the state. F G

[29] This was further supported by the evidence of PW2, PW3 and PW4, all of whom confirmed that the state had not given its consent to the conditional agreement. PW4 had confirmed that when he was in the state exco meeting around 2004–2008, the principal agreement could not be proceeded with as the same had been rejected by the state exco meeting. There was a clear decision made by the state exco meeting for the said project to be cancelled and/or not to be proceeded with. The evidence of PW2 was corroborated by the evidence of PW4 who was the chairman and a board member of the defendant. The said project at the material point was only at the stage of presentation and physical works at the site had not yet commenced. H I

[30] Learned counsel for the plaintiff, besides reiterating all the points that were raised before the learned High Court judge, emphasised that all the

A agreements entered into between the respective parties must be read and construed by looking at the conduct of these parties. According to learned counsel from the series of conduct of the representatives of the defendant it would appear that the defendant had orally consented to the assignment of rights of EDV under the principal agreement to the plaintiff. When EDV
B withdrew from the principal agreement, the plaintiff carried on the obligations under the principal agreement. The defendant had replaced EDV and proceeded to discuss with the plaintiff and carried out the redevelopment of the said project.

C **[31]** Despite holding discussions with the plaintiff and given the impression that the plaintiff was to undertake the said project, the defendant instead had allowed and/or consented for the state to appoint Murni Dungun Sdn Bhd, a third party, to replace the plaintiff. Hence there was repudiation of the principal agreement.
D

[32] Upon our evaluation of the evidence before the learned judge both testimonial and documentaries we found that there was no oral and/or written consent given by the state to accede to the MOU and/or the 18 December
E agreement. Neither was there any consent given by the defendant for the same. Therefore the rights and liabilities of EDV under the principal agreement were never assigned to the plaintiff. In view of the aforesaid we were of the view that the plaintiff lacked the standing to commence this proceeding against the defendant.

F **[33]** Before we delve with the issue of the plaintiff's standing to commence this case against the defendant, we propose to deal with the issue of conditional agreement as highlighted by learned counsel for the defendant.

G **[34]** It is trite law that if a contract is a conditional contract, there is no contract to be completed unless and until the condition precedent set out in that contract had been fulfilled.

[35] The law on conditional contract can be gleaned from the following
H cases:

(a) in *Southwest Minerals (M) Sdn Bhd v Kekal Baru Sdn Bhd* [2014] 1 LNS 1076 the court had discussed the law applicable to conditional contract in a very extensive manner. The court held as follows:

I [11] As regards the general principles applicable to a conditional contract, the Privy Council in *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] 1 MLJ 47; [1959] 1 LNS 3 held that:

> The following general principles are warranted by authority and manifestly reasonable: (i) where a conditional contract of sale fixes a date

for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

[12] Section 33 of the Contracts Act, 1950 provides for the effect of a contingent event becoming impossible, which is that the contract becomes void. It lays down that:

33 Enforcement of contracts contingent on an event happening

(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

(b) If the event becomes impossible, such contracts become void.

[13] In a case squarely in point with the instant case, the Federal Court in *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211; [1983] CLJ Rep 282 held:

(1) the agreement became void because of the refusal of Foreign Investment Committee to approve the sale over which neither the appellants nor the respondents had control and therefore the various consequential orders made by the learned trial judge were valid;

(2) Whether it is held that the requirement as to approval is a contingent condition or is a mere promissory condition the result would not be different. In the first case there was no agreement to enforce until the requirement was satisfied and the deposit was returnable under the provision of the agreement itself as there was no ground for withholding it any longer; whereas in the second case although there was a subsisting contract it was however defeated or frustrated by a supervening event, which is non-fulfillment of the requirement and in this case also the deposit was refundable as money had and received for the use of the appellants who had paid it.

[14] Salleh Abas CJ (Malaya) (later LP) in holding that the contingent event had become impossible upon refusal of approval rendering the contract void in accordance with s 33(a) of the Contracts Act 1950 remarked:

It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. *It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall*

> *not take effect unless and until the condition is fulfilled* (see *Trans Trust SPRL v Danubian Trading Co Ltd* — per Denning LJ — and *Property and Bloodstock Ltd* — per Sachs LJ). Until the FIC approval was given liability for further performance remained unenforceable, ie, suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is the effect laid down by s 33(a) of the Contacts Act 1950 ...

(See *Yakinline Marketing Sdn Bhd v Mayban Securities Sdn Bhd* [2013] 5 MLJ 677; [2010] 1 LNS 1069 where the above case was followed by the Court of Appeal.) ...

[21] For ease of reference, the fundamental terms expressed in the SPA are reproduced below in extenso. Recital (b) states:

> (b) The Vendor/s have agreed to sell and the Purchaser has agreed to purchase the said Property subject to and conditional upon the Vendor/s obtaining a Grant of Letters of Administration and an order to sell and transfer the said Property to the Purchaser from the High Court of Malaya (hereinafter collectively called 'the Court Order') and further to effect transmission of the said Property in favour of the administrator and/or in favour of the Vendor/s at its own costs and expense within six months from the date of this agreement or such further time as the Purchaser may allow at the Purchaser's absolute discretion (hereinafter called 'the Condition Precedent').

[22] By virtue of clause 1(i), SPA the agreement by the Vendor to sell and the Purchaser to purchase the subject property is in consideration of the payment of the stipulated deposit and part-payment but subject to the fulfillment of the condition precedent imposed by Recital (b).

[23] It is to be noted from the above clause that *the present contract in respect of sale of the subject land to the Defendants is a 'contingent' or conditional contract that takes effect only upon two conditions precedent which are of a fundamental character being fulfilled. Upon the conditions not being fulfilled, the SPA is deemed revoked and rescinded and accordingly, the contracting parties are thenceforth relieved of their contractual obligations and liabilities*. Compliance with the said conditions cannot be compelled but is a requirement for the parties' contractual obligations to come into force. Hence, the Court cannot order performance of the conditions as the contract itself provides a remedy for non-compliance. *By virtue of* s 33(a) of the Contracts Act, *contingent contracts cannot be enforced by law until the event on which the contract is contingent has happened.* For the contract to be binding and enforceable unconditionally fulfillment of the conditions precedent spelt out is mandatory.

[36] The facts before us were somewhat similar to the facts in the Federal Court case of *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 ('National Land Finance'). In *National Land Finance*, National Land Finance Co-operative Society Ltd Cooperative conditionally

agreed to purchase certain immovable properties from Sharidal Sdn Bhd subject to the approval of the foreign investment committee ('FIC'). However the FIC refused to give its consent to the sale of the property but agreed for the property to be transferred to a joint venture company. The High Court held that the agreement become void because of the refusal of the FIC to consent to the sale of certain property belonging to Sharidal Sdn Bhd and the decision of the High Court was affirmed by the Federal Court. His Lordship Salleh Abas CJ (as His Lordship then was) held as follows:

> It is, however, a condition which is known in law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled.

[37] The Federal Court in *National Land Finance* had relied on s 33(b) of the Contracts Act 1950 and held:

> As the approval in this case was refused it means that the contingent event becomes impossible and the agreement therefore becomes void in accordance with s 33(b) of the Contracts Act.

[38] The law with respect to conditional contract had been comprehensively set out in the cases cited above with the case of *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47 quoted in *Southwest Minerals (M) Sdn Bhd v Kekal Baru Sdn Bhd* [2014] 1 LNS 1076 being a leading case in this area of the law. In *Aberfoyle Plantations v Khaw Bian Cheng*, Aberfoyle Plantation Ltd entered into a conditional agreement with Khaw Bian Cheng to sell 1336 acres of rubber plantation. Clause 4 of the agreement provided that 'the purchase is conditional on the vendor obtaining ... a renewal of seven leases ... so as to be in the position to transfer the same to the purchaser... and if for any cause whatsoever, the vendor is unable to fulfill this condition this agreement shall become null and void and the vendor shall refund to the purchaser the deposits already made'. Despite the initial dateline having been extended the condition precedent could not be fulfilled.

[39] The issue before the Privy Council was whether Khaw Bian Cheng was entitled to the refund of the deposit premised on the ground that the condition precedent had not been fulfilled by the vendor within the stipulated time. The Privy Council held that Khaw Bian Cheng was entitled to the refund of the deposit because the condition precedent was not fulfilled by Aberfoyle Plantation Ltd.

[40] Likewise in the case at hand term No 5 had stipulated that the 18 December agreement shall be automatically cancelled if the consent of the defendant and the state was not obtained within six months from the date of the agreement and/or the same was further extended. There was no evidence

adduced by the plaintiff before the learned High Court judge to show that the 18 December agreement had been extended.

[41] Based on the evidence placed before the learned judge we found that until 17 June 2006 ie the dateline stipulated in the 18 December agreement the plaintiff failed to obtain the consent of the defendant and the state for the rights and liabilities under the principal agreement to be assigned to the plaintiff. Therefore the 18 December agreement was deemed to be automatically void. Hence there was no assignment of rights from EDV to the plaintiff to begin with. That being the position the plaintiff would not be able to enforce his rights under the 18 December agreement against the defendant. In any event as shown vide exh D4 the state had vide its letter dated 9 January 2008 to the defendant notified the defendant that the state exco meeting No 35/2007 dated 14 November 2007 had rejected the proposal by the defendant for the state's project and the same had been cancelled. The decision for the defendant to carry out the said project had been cancelled and there no contract to be enforced after all.

[42] The plaintiff had attempted to show us that pursuant to the 18 December agreement there was no requirement for the consent for the assignment of rights and liabilities to be in writing as consent could also be given orally. Learned counsel submitted that in this case there was an oral consent given by the defendant. Further it was also argued before us that under cl 5 of the 18 December agreement there was no requirement for the consent to be given by both the defendant and the state, but as long as one of the party gave the consent that would be enough to satisfy cl 5. In this case the defendant had given its consent orally.

[43] Alternatively, the plaintiff argued that there was overwhelming evidence through the conduct of the defendant to prove to this court that the consent for an absolute assignment of rights and liabilities had been impliedly given by the defendant under cl 5 of the 18 December agreement.

[44] Having considered the learned judge's brief grounds and perused the notes of evidence, we observed that the learned judge had arrived at the conclusion that there existed continuous negotiations between the plaintiff and the defendant from their conduct and from this conduct there was an agreement entered into between the plaintiff and the defendant. Except for his one-line reasoning, the learned judge did not offer any justification and or credible evidence to support his finding that a contract had been entered into between the plaintiff and the defendant. We observed that in arriving at the said decision there was lack of judicial appreciation of the material facts placed before him. The findings were based on a mere conjecture unsupported by credible evidence.

[45] Upon perusal of the notes of evidence we found that the plaintiff's own witness ('PW1') had admitted that GPQ was not privy to the 18 December agreement and that there was no consent given by the defendant for assignment of rights and liabilities from EDV to the plaintiff (see pp 497–498 appeal record *Jld* 2A, p 230 appeal record *Jld* 2). PW2 also confirmed the same. In fact PW2 had stated that in the meetings with GPQ, GPQ had not given the consent for the said assignment as they were awaiting approval from the state. All the witnesses of the plaintiff, PW1, PW2, PW3 and PW4 confirmed that the state had not given its permission for the same (see at pp 275 and 277 of appeal record *Jld* 2). This was because the state had decided not to proceed with the development of the said project. As the state itself had cancelled the said project, there was nothing the defendant could do to give effect to the principal agreement. PW2 had also confirmed that there was no physical work at the site (see p 278 of appeal record *Jld* 2).

[46] We have taken the liberty to peruse the notes of evidence and found that there was no evidence adduced by the plaintiff to support the argument that there existed a collateral agreement and/or that a contract had been concluded between the respective parties herein to entitle the plaintiff to pursue its claim against GPQ for breach of contract. Based on the evidence placed before us we found that the learned judge's findings that there existed a valid contract between the plaintiff and GPQ by way of conduct misconceived.

[47] Guided by the principles enunciated in the above quoted cases and on an examination of words of the MOU and the 18 December agreement, placed before us as well as the evidence, both testimonial and documentaries, we could not but agree with the points raised by the defendant, both in its written and oral submission, that Preamble II, cll 3 and 5 of the 18 December agreement as well as cll 1, 2, 3 and 5 of the MOU satisfied the requirement that the 18 December agreement and the MOU were conditional agreement and the condition precedent stated therein could not be fulfilled by the defendant due to reasons discussed herein. As such, the agreement remained conditional. Unless and until the consent of the state and the defendant were obtained such an agreement remained void and unenforceable.

Collateral agreement

[48] The plaintiff was relying on oral negotiations to prove that there was a valid agreement between the plaintiff and the defendant. We were of the view that the oral evidence and/or the collateral agreement which the plaintiff claimed to have existed would not have effect on the MOU and/or the 18 December agreement. The plaintiff's oral evidence which they sought to allege that there existed a valid contract is inadmissible by reason of ss 91 and 92 of the Evidence Act 1950.

[49] Section 91 of the Evidence Act 1950 makes provision that when the terms of the contract have been reduced in the form of a document, no evidence shall be given in proof of the terms, except the contract itself. Section 92 of the same Act on the other hand provides that once a contract has been proved under s 91 no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms (see *United Malayan Banking Corp Bhd v Tan Lian Keng & Ors* [1990] 1 MLJ 280). The above-quoted case illustrated the principle that s 91 of the Evidence Act 1950 excludes extrinsic evidence to be adduced of the contents of a document except the document itself. The case further ruled that even if the evidence of negotiations were admitted because the action raises a question of rectification, or misrepresentation, the court should not allow itself to be influenced by that evidence when it comes to construing the agreement. (Please also see *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329; *Director General of Inland Revenue v Ee Sim Sai* [1977] 2 MLJ 32; *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243.)

[50] Notwithstanding what we stated above we reiterate that based on the factual matrix before us there was no concluded contract between the plaintiff and the defendant.

Locus standi/privity of contract

[51] Turning now to the issue whether the plaintiff had the locus standi to commence the proceedings against the defendant. There is a plethora of cases which support the proposition that only parties to the agreement can sue under the contract. In *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170; [1967] 1 MLRA 426, the Privy Council held as follows:

> It is true that s 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the Appellant, was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary paras (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue.

[52] The above principle of law was reiterated by the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 1 MLRA 183 where the Federal Court held:

> [85] Kepong Prospecting in therefore authority for the proposition that the words 'or any other person' appearing in s 2(d) of the Contracts Act 1950 are not to be too wide to exclude the doctrine of privity of contract. It follows, by parallel reasoning, that the identical words used by s 66 do not include persons who are not parties to

a contract under which a benefit passed. In my judgment, there is no justification, in principle or policy, to extend the terms of the section by means of an interpretation that runs counter to settled jurisprudence. It follows that the only parties to a contract may claim or become liable to make, restitution under that section. Any other construction would produce an anomaly because, while only parties to a contract may sue upon it, yet, when the very same contract is discovered to be void, anyone, including persons who cannot enforce it may recover any benefit received by one of the parties thereto.

[86] Accordingly, in my judgment, 'any persons' appearing in s 66 must refer only to parties to the original contract that either becomes or is discovered to be void. The Indian case of Giraj Baksh and Devi Prasad relied upon by the respondent in the High Court were not correctly decided and do not represent our law.

[53] In the instant case the plaintiff had entered into contract with EDV and not the defendant. The defendant was not a party to the MOU and the 18 December agreement. Only EDV and the plaintiff entered into the MOU and 18 December agreement. The plaintiff could only enforce the MOU and the 18 December agreement if it had complied with the condition precedent as discussed above. We found that the plaintiff had failed to prove that the rights and liabilities pursuant to the MOU and the 18 December agreement had in fact been transferred to them within the time stated in the MOU and/or the 18 December agreement.

[54] The learned judge merely stated there were negotiations between the plaintiff, defendant and the state but had not elaborated on the details of these negotiations and/or whether the terms of negotiations were firmed up and/or agreed upon subsequently by the respective parties, including the state, to form a valid and binding contract.

[55] Even 18 December agreement itself had envisaged that EDV and the plaintiff would ultimately execute an agreement in writing, for the rights and liabilities under the said agreement to be assigned absolutely to the plaintiff. However, as evidenced before us there was no agreement in writing having been executed by the plaintiff and the defendant pursuant to the 18 December agreement. Therefore the rights and liabilities under the 18 December remained with EDV until repudiated.

[56] We found that based on the factual matrix that we have outlined above the MOU and the 18 December agreement automatically became void because the condition precedent the MOU and the 18 December agreement were not fulfilled by 17 June 2006. Since the MOU and 18 December agreement were void and unenforceable, there was no assignment of rights and liabilities from

EDV to the plaintiff. As such there were no basis for the plaintiff to commence this action against the defendant on the terms of the principal agreement. Further the principal agreement was also void pursuant to s 33(b) of the Contracts Act 1950 when the state cancelled its approval in MMKN 2004 for the said project.

Legitimate expectation

[57] On the issue of legitimate expectation we agree with the point raised by the defendant that the doctrine of legitimate expectation is only applicable in public law and not to private law matters. The case relied by the plaintiff *Wolley Development Sdn Bhd v Mikien Sdn Bhd* [2008] 1 MLJ 585 ('Wolley') would not be applicable to the case at hand as the facts in these two case were not similar. In the case of *Wolley* the second defendant in that case had accepted the transfer agreement which contained the right and liabilities to rehabilitate conditionally the project unequivocally. Whereas in our case the defendant and EDV accepted the MOU and 18 December agreement conditionally.

Assessment of special damages

[58] We observed that the learned judge erred in making an order for the special damages to be assessed in the same manner the general damages ought to be assessed when the same could be quantified by the learned judge based on the oral as well as the documentary evidence adduced before him. He ought to have evaluated this evidence and quantified the amount at the time judgment was delivered.

CONCLUSION

[59] Having examined the appeal record and perused the written submission and heard the oral arguments, we were constraint to hold that the learned judge failed to judicially appreciate the evidence and/or the law presented before him so as to render his decision plainly wrong and upon curial scrutiny merit our appellate intervention.

[60] Based on the aforesaid, we unanimously allowed this appeal with costs of RM30,000 herein and below to be paid by the respondent to the appellant subject to allocator. Deposit to be refunded. The decision of the High Court was set aside.

[61] We therefore ordered accordingly.

Appeal allowed with costs of RM30,000 herein and below to be paid by respondent to appellant subject to allocator; decision of the High Court set aside.

Reported by Nisha Paran